Filed 1/29/10 Faulkner v. Cal. Victim's Compensation and Government Claims Bd. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

KENNETH FAULKNER, Plaintiff and Appellant, v. CALIFORNIA VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD, Defendant and Respondent.	B211653 (Los Angeles County Super. Ct. No. BS112408)

APPEAL from a judgment of the Superior Court of Los Angeles County. David P. Yaffe, Judge. Affirmed.

Ellen Hammill Ellison for Plaintiff and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, and Michael P. Farrell, Senior Assistant Attorney General, for Defendant and Respondent.

SUMMARY

Plaintiff Kenneth Faulkner appeals from the trial court's denial of his petition for a writ of mandate after respondent Victim Compensation and Government Claims Board (the Board) rejected his claim for compensation for his allegedly erroneous conviction and imprisonment. Plaintiff contends that "respondents" failed to carry their burden of proof and the Board misstated the charges against him and ignored evidence supporting his claim of innocence. We affirm.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff's conviction

Plaintiff was tried in Kern County on charges of falsely imprisoning and attempting to kidnap two minors, Brandon M. and Samantha S. The charges were based upon a November 25, 1999 incident in which plaintiff approached children playing in an apartment building parking lot, including Brandon, Samantha, Breanna B., and Tiffany G.

Brandon, who was five years old at the time of the incident, testified at trial that on Thanksgiving Day of 1999 he was playing in the parking lot at the apartment complex in which he lived when plaintiff approached on a bicycle. Plaintiff asked him his name, grabbed his wrist, and pulled him a short distance toward the parking lot exit. Plaintiff released Brandon after Brandon threw a rock at him.

Samantha, who was eight at the time of the incident, testified at trial that she was playing in the apartment parking lot with Breanna, Tiffany, Brandon, and an unidentified boy on Thanksgiving Day, 1999, when plaintiff rode in on his bicycle. Plaintiff stopped and offered Samantha and Breanna $20 if they would go with him. Plaintiff asked Samantha and Breanna their names and ages. Samantha said she was "Baby Spice" (one of the Spice Girls) and was 12 years old. Samantha and Breanna began walking away. Plaintiff grabbed Samantha by the waist and placed her on the handlebars of his bicycle. Samantha kicked plaintiff in the knees and escaped from plaintiff while Breanna and the unidentified boy choked and kicked plaintiff. Samantha also testified that plaintiff picked Brandon up by his waist, as if to place him on the bicycle handlebars. Later, Kern County

Deputy Sheriff Eric Fennell drove Samantha to view a man. It was plaintiff, but he was wearing a hat and different clothing than he was during the incident in the parking lot.

Samantha's stepsister Breanna, who was also eight at the time of the incident, testified at trial that on Thanksgiving Day, 1999, she and Samantha were playing with cats in the apartment parking lot when plaintiff rode up on his bicycle. Plaintiff offered Breanna and Samantha $20 if they would go with him to the store. Plaintiff then picked Samantha up by her waist and put her on the handlebars of his bicycle. Breanna kicked plaintiff in the leg and Samantha jumped off the handlebars. Samantha and Breanna then walked away from plaintiff, toward where Tiffany and Brandon were playing. Plaintiff followed and offered Tiffany $20 to go to the store with him. Plaintiff grabbed Brandon by the hand. Samantha and Breanna ran to Breanna's apartment and told her mother what had happened.

Tiffany, who was nine at the time of the incident, testified at trial that on Thanksgiving Day, 1999, she was playing in the apartment parking lot with Samantha, Breanna, and Brandon. Plaintiff approached the children and lifted Samantha by her waist onto the handlebars of his bicycle. C.J., Breanna's brother, hit plaintiff. Samantha jumped off the bicycle. Plaintiff then approached Brandon and Tiffany, who were a short distance away. He told them they were cute, asked their names and ages, and said he wanted to take them home with him. Plaintiff also said he liked Brandon. Plaintiff then grabbed Brandon by the arm and tried to put him on the bike. Brandon screamed. Samantha and Breanna said something to plaintiff, who released Brandon and left on his bicycle.

Breanna's mother, Carol, testified that after Breanna and Samantha ran inside the apartment and told her that someone tried to "kidnap" them, she ran outside to the parking lot, asked some boys which way "he" went, then ran in the direction the boys indicated. She saw someone ahead of her riding a bicycle. Someone followed Carol in a car and picked her up. They followed the cyclist to a house, noted the address, and returned to the apartment complex. Carol identified plaintiff as the cyclist she followed.

Deputy Fennell testified at trial that he responded to the apartment complex, spoke to Carol, then accompanied Carol to the address she provided, where he arrested plaintiff. Fennell told plaintiff he was being arrested for kidnapping a child for sex crimes. Plaintiff repeatedly denied doing anything and asked, "[A]re those kids going to court?" and, "Did they say that I grabbed them?" Plaintiff also stated, "I had no sexual gratisfaction [*sic*], so it didn't happen" and that he "had to change the plain [*sic*], moving them from the sidewalk to the road" or something similar to that.

A jury convicted plaintiff of attempted kidnapping and felony false imprisonment with respect to Brandon and acquitted plaintiff of the charges with respect to Samantha. The abstract of judgment cites the authority for plaintiff's conviction as Penal Code sections 664, 208, subdivision (b), and 236. (All further statutory references are to the Penal Code.) Section 208, subdivision (b) is a sentencing provision applicable where the "person kidnapped is under 14 years of age at the time of the commission of the crime." Although the Board's written decision indicates plaintiff was convicted of attempted kidnapping "for the purpose of committing lewd and lascivious acts," we have found nothing in the administrative record to indicate that the jury convicted plaintiff under section 207, subdivision (b), which addresses kidnapping a child under the age of 14 for "the purpose of committing any act defined in Section 288." We further note that nothing in the nonpublished opinion of the Court of Appeal, Fifth District, addressing plaintiff's appeal and petition for a writ of habeas corpus suggests that the attempted kidnapping charge was under section 207, subdivision (b). (*People v. Faulkner* (Apr. 10, 2003, F035831, F041713).)

Plaintiff was sentenced to a third strike term of 30 years to life. The appellate opinion indicates that plaintiff's "prior convictions include kidnapping and forced oral copulation (§§ 207, 288a), kidnapping (§ 207-apparently with the intent to commit forced oral copulation), false imprisonment and assault (§§ 237, 245), and numerous convictions for possession of a firearm by a felon and narcotic violations. The kidnapping and false imprisonment convictions all occurred during a three-month period in 1979 and involved

use of a gun with female victims of similar age to Faulkner. In 1993 Faulkner was convicted of a 'class 5 felony' for enticing two girls, ages sixteen and a seventeen, to a motel room, attempting to get them intoxicated, and refusing to let the girls leave the motel room when they refused to have sex with him. The girls eventually left without further incident." (*People v. Faulkner, supra*, B035831, F041713.)

Plaintiff's habeas corpus proceedings

Plaintiff appealed and filed a petition for a writ of habeas corpus alleging, inter alia, that Breanna and Samantha had recanted, Tiffany had admitted that part of her testimony was false, and Brandon had admitted that plaintiff merely "admonish[ed] and grabb[ed] him for throwing rocks." The petition admitted that plaintiff held Brandon by the arm, but argued that "this act was not part of an attempted kidnapping or false imprisonment, but solely in reaction to the throwing of rocks at [plaintiff] and calling him retarded by Brandon and other boys." The Court of Appeal, Fifth District, issued an order to show cause, returnable in the superior court, which conducted an evidentiary hearing.

Brandon's testimony at the evidentiary hearing was essentially the same as his testimony at trial, except that he mentioned another child who was outside and stated that plaintiff asked "our names" and ages. He further testified that when plaintiff grabbed his wrist, he threw a rock at plaintiff and screamed. Plaintiff then let go of him and rode away. Brandon insisted he had not thrown any rocks at plaintiff before plaintiff grabbed his wrist.

Samantha testified at the evidentiary hearing that some of her trial testimony was false. Her testimony that plaintiff approached her and Breanna, asked them their names and ages, and offered to pay them $20 to go with him was true. Her testimony that plaintiff grabbed Brandon by the wrist was also true, but plaintiff did not try to take him anywhere. Her testimony that plaintiff was wearing different clothing when Deputy Fennell took her to identify plaintiff was also true. But her testimony that plaintiff grabbed her and put her on the bicycle was false. Plaintiff never touched Samantha, and no one kicked or choked plaintiff. Samantha also testified that Brandon was throwing

rocks at plaintiff. When plaintiff grabbed Brandon, he asked Brandon to stop throwing rocks at him.

Breanna also testified at the evidentiary hearing that some of her trial testimony was false. Her testimony that plaintiff picked Samantha up was false. Plaintiff did not touch Samantha, Breanna, or any child other than Brandon. Brandon was throwing rocks and plaintiff grabbed Brandon's arm and said, "[C]ould you please stop throwing rocks?" Breanna also testified that plaintiff was wearing a different shirt when he was arrested than during the incident in the parking lot.

Tiffany's testimony at the evidentiary hearing was essentially the same as her testimony at trial, with minor deviations. She added that after plaintiff rode into the parking lot, C.J. and Scotty were teasing plaintiff and throwing rocks at him, but Brandon was not. Tiffany testified that plaintiff "tried" to put Samantha on the handlebars of his bicycle. (At trial Tiffany testified plaintiff put Samantha on the handlebars.) Tiffany testified that plaintiff "told us we were cute and then asked us if we wanted to go home with him and he said he would take us." (At trial she testified that plaintiff also asked the children their names.) Tiffany testified that plaintiff grabbed Brandon by the wrist, whereas at trial she testified that plaintiff grabbed Brandon by the *arm* and tried to put him on the bicycle. Tiffany also testified that plaintiff was wearing different clothing when he was arrested than during the incident in the parking lot.

Brandon's mother, Edie, testified at the evidentiary hearing that she heard Brandon screaming and ran outside to see what happened to him. He was so upset that he just screamed and would not speak. She further testified that after plaintiff was convicted in this case, plaintiff sent her letters from prison. One of the letters was addressed to both Edie and Carol, Breanna's mother, so Edie showed the letter to Carol. In one of the letters to Edie, plaintiff protested his innocence, threatened to "destroy" and "traumatize" the "amoral" children if he got a new trial, and offered to split the money he would obtain from the state for wrongful imprisonment if Brandon would admit that he lied.

Tiffany's mother, Trina, testified at the evidentiary hearing that she heard atypical screams from outside on the day of the incident. She thought a child had been hit by a car.

Samantha's mother, Bernice, testified at the evidentiary hearing that Samantha had a tendency to fabricate, including making false allegations that caused authorities to remove Samantha from Bernice's custody in February of 1999.

The trial court denied the petition. Plaintiff filed a new habeas petition in the appellate court, which again issued an order to show cause.

The appellate court granted the habeas petition and dismissed the consolidated appeal as moot. The court reasoned that the testimony of Samantha, Breanna, and Tiffany was integral to the finding of plaintiff's intent with respect to Brandon. Their partial recantation and their new testimony regarding Brandon or other boys throwing rocks at plaintiff and calling him names undermined the court's confidence in the verdict. The court's finding was not based upon the sufficiency of evidence. The court remanded the case for retrial, but the Kern County District Attorney decided not to retry plaintiff.

Administrative proceedings on plaintiff's claim for compensation

After his release from prison, plaintiff filed a claim under section 4900 for compensation for his allegedly erroneous conviction and imprisonment. The Attorney General opposed the claim. The Board conducted an evidentiary hearing at which plaintiff testified.

Plaintiff testified that he cycled into the apartment parking lot and saw children playing. Samantha and Breanna ran up to him screaming that they wanted $20. Samantha said they would do anything plaintiff wanted for $20. Plaintiff thought they were making a sexual proposition but might not fully understand this. He asked if they knew what they were saying. They said they did. Plaintiff asked the girls how old they were and, according to his testimony, they said, "something like 13 or 14 or 15, 16." He later testified that Samantha said she was 15 and Breanna said she was 16. Plaintiff testified that at some point Brandon ran up to plaintiff and demanded that plaintiff give

him the bicycle. Plaintiff said no, and Brandon suggested he would take it from plaintiff. Plaintiff laughed and said he did not think Brandon could do that. In contrast to the admission and theory advanced in his habeas petition, plaintiff denied grabbing Brandon and denied that anyone was throwing rocks. Plaintiff quickly departed.

Plaintiff initially denied having a conversation with Breanna and Samantha about virgins. The Attorney General then confronted plaintiff with a passage in one of the letters he sent Brandon's mother from prison. Plaintiff admitted that he wrote the letter, which was introduced as an exhibit. The letter included the following: "Maybe Brandon lied b'cuz [*sic*] I wouldn't give him my bicycle as he ordered me to do. And maybe Sam & Breanna started it all b'cuz [*sic*] I asked them if they even knew what a virgin was & Sam said 'It's a girl who hasn't had a baby yet' & I corrected her . . . . This was after they [illegible] me 'We'll do anything you want for $20.'"

Plaintiff testified that Samantha and Breanna were "talking about going in their backyards and doing things with me, sexual things." They said they "wanted me to take off my clothes and them take off their clothes and do things." Samantha said she would take off her clothes, dance, and "suck my dick." Plaintiff then asked the girls if they were virgins and they said yes. He then asked them if they knew what a virgin was. "They" responded that a virgin was a girl who had not had a baby. Plaintiff corrected them, saying it was a girl who had not had sex. Plaintiff left quickly. Plaintiff denied that he had asked the children their names, told them they were cute, offered them money, or changed clothing afterward. He insisted that he made no statements to law enforcement officers apart from saying that he had not done anything. Fennell lied at trial.

Asked to describe his claimed pecuniary injury resulting from his conviction and incarceration, plaintiff said, "Well, being imprisoned." He then testified, "I lost three and a half years out of my life. I — and during this three and a half years — my house had recently burned down. And the insurance, since they knew I was in prison for life, they denied my claim . . . . [A]nd people stole — broke into my house and stole, and stole my vehicles, stole all my furniture, all my clothes. You know, they just cleaned me out.

Somebody stripped my house, stole the — all the fixtures, appliances[,] . . . bathtub and all of the bathroom accoutrements, the toilets, sink, they stole all that. . . . [T]hey stole all my dishes, everything." Plaintiff then clarified that the theft occurred sometime after the fire, that the fire "was put out real quick," and he was not incarcerated at the time of the fire, which occurred about six months before the incident giving rise to the charges and conviction, in May of 1999. When asked if he was employed at the time of his arrest, plaintiff replied that he was disabled. He also claimed he suffered from posttraumatic stress disorder, citing his fear of "kids" and "cops."

The Board rejected plaintiff's section 4900 claim. The hearing officer's written decision set forth a determination that plaintiff had failed to prove every one of the elements required to establish his claim.

Plaintiff challenged the Board's decision with a petition for a writ of mandamus in Los Angeles Superior Court. The trial court denied his petition, and plaintiff filed this appeal.

DISCUSSION

Section 4900 provides that anyone who was convicted of a felony and served time in prison may present a claim for compensation "for the pecuniary injury sustained by him or her through the erroneous conviction and imprisonment" if he or she meets the requirements of section 4903 and was either (1) pardoned by the Governor because "the crime with which he or she was charged was either not committed at all or, if committed, was not committed by him or her" or (2) "innocent of the crime with which he or she was charged for either of the foregoing reasons."

The version of section 4903 in effect at the time plaintiff's claim was made and considered requires a claimant to prove "the facts set forth in the statement constituting the claim, including the fact that the crime with which he was charged was either not committed at all, or, if committed, was not committed by him, the fact that he did not, by any act or omission on his part, either intentionally or negligently, contribute to the bringing about of his arrest or conviction for the crime with which he was charged, and

the pecuniary injury sustained by him through his erroneous conviction and imprisonment."[1]

Thus, plaintiff had the burden of proving each of the following elements to receive favorable action on his claim for compensation: (1) that the crimes with which he was charged were either not committed at all, or, if committed, were not committed by him; (2) that he did not, by any act or omission on his part, either intentionally or negligently, contribute to bringing about his arrest or conviction for the crime with which he was charged; and (3) the pecuniary injury he sustained through his erroneous conviction and imprisonment. (*Tennison v. California Victim Comp. & Government Claims Bd.* (2007) 152 Cal.App.4th 1164, 1187 (*Tennison*).)

In reviewing the Board's denial of a claim for compensation under section 4900, we examine the administrative record to determine whether the Board's findings were supported by substantial evidence, resolving all conflicts in the evidence and drawing all inferences in support of the findings. (*Tennison, supra*, 152 Cal.App.4th at p. 1181.) If the findings are supported by substantial evidence, we determine whether the findings support the Board's legal conclusions or its ultimate determination.

Plaintiff challenges the Board's conclusions that he failed to carry his burden of proof on several theories. First, he argues that "Respondent" failed to carry *its* burden of proof. Respondent is, of course, the Board, which has no burden of proof. Presumably plaintiff used "Respondent" incorrectly to refer to the state or its representative, the Attorney General. With respect to plaintiff's claim, however, the state and the Attorney General had no burden of proof, either. The burden rested entirely upon plaintiff.

---

[1] After the Board's decision, section 4903 was amended, in pertinent part, to require that a claimant prove, inter alia, that "he or she did not, by any act or omission on his or her part, intentionally contribute" to bringing about his or her arrest or conviction. The amendment does not affect the analysis or result in this case.

The task before the Board was to determine whether plaintiff proved he (1) neither kidnapped nor falsely imprisoned Brandon, (2) did not, by act or omission, intentionally or negligently contribute to bringing about his arrest or conviction, and (3) sustained pecuniary injury caused by his erroneous conviction and imprisonment. We need not address each element because plaintiff was required to prove all three. We thus address only the Board's factual findings and determination with respect to the second element.

The Board made the following factual findings pertinent to its determination that plaintiff failed to prove that he did not, by act or omission, intentionally or negligently contribute to bringing about his arrest or conviction. It found that plaintiff rode into the parking lot on November 25, 1999; approached several minors, including Samantha, Breanna, Tiffany, and Brandon; asked them questions; and grabbed Brandon by the wrist. Brandon broke free by striking plaintiff with a rock. (Finding of fact number 1.) This finding was supported by substantial evidence, in the form of Brandon's testimony at the trial and the habeas corpus evidentiary hearing. It was also supported by the testimony of Tiffany, which was consistent on these points at both the trial and the habeas corpus evidentiary hearing. Samantha's testimony at the habeas corpus evidentiary hearing was also consistent with her trial testimony that plaintiff asked her name and age and offered her $20 to go with him and that plaintiff grabbed Brandon by the wrist. In addition, plaintiff admitted in his own testimony at the administrative hearing that he rode into the parking lot and asked questions of at least two of the enumerated minors.

The Board further found that when a sheriff's deputy told plaintiff that he would be booked on charges of "kidnapping a child for sex crimes based upon his actions in the parking lot, [plaintiff] asked the deputy if the children were going to court and whether the children said that he grabbed them." Plaintiff also said, "'I had no sexual gratisfaction [*sic*], so it didn't happen.'" (Finding of fact number 2.) This finding was supported by substantial evidence in the form of Fennell's testimony at trial.

The Board further found that plaintiff was wearing different clothing when he was arrested than he had been wearing when he rode into the parking lot. (Finding of fact

number 3.) This finding was supported by substantial evidence in the form of the trial testimony of Samantha, and the testimony of Samantha, Breanna, and Tiffany at the habeas corpus evidentiary hearing.

The Board further found that after he was convicted plaintiff sent multiple letters to Brandon's mother and one letter addressed to both Brandon's mother and Breanna's mother. (Finding of fact number 6.) This finding was supported by substantial evidence in the form of the testimony of Brandon's mother at the habeas corpus evidentiary hearing, the letter admitted at the administrative hearing as the Attorney General's exhibit 6, and plaintiff's admission at the administrative hearing that he wrote exhibit 6, in which he admitted having a conversation with Samantha and Breanna about the definition of "virgin" after they offered to do anything plaintiff wanted for payment of $20.

The Board further found that plaintiff's testimony at the administrative hearing was not credible. (Finding of fact number 10.) In addition to any inferences the hearing officer may have drawn from plaintiff's demeanor — a matter we cannot discern from the transcript of the hearing — this finding was supported by several aspects of plaintiff's testimony, including (1) his initial denial that he had a conversation with Samantha and Breanna about virgins, followed by his sudden, extremely detailed recollection of this conversation when confronted with the Attorney General's exhibit 6; (2) the incredible details of that conversation, including plaintiff's claim that two eight-year-old girls wanted him to take his clothes off and engage in sexual activity with them; and (3) plaintiff's misleading discussion of his house burning down when asked to identify his pecuniary injury from imprisonment, even though the house fire occurred about six months before the incident giving rise to the charges, together with his claim that the insurer denied his claim because he was in prison for the crimes against Brandon.

Collectively, these findings support the Board's determination that plaintiff failed to prove that he did not, by act or omission, intentionally or negligently contribute to bringing about his arrest or conviction. Plaintiff was not simply riding down the street or through the parking lot of a retail establishment when he encountered the children. He

instead entered the parking lot of an apartment building, a location he had no reason to be visiting, as far as the record reveals. *He* approached the children and initiated conversation with them by asking them questions, including their names and ages. Plaintiff admittedly engaged two eight-year-olds, Samantha and Breanna, in a sexually explicit conversation. Plaintiff grabbed Brandon by the wrist and did not relinquish him until Brandon struck him with a rock. Grabbing Brandon constituted a battery, and the surrounding, highly suspicious circumstances suggested an intent to do more than simply touch Brandon's wrist. Indeed, plaintiff's conduct in holding onto Brandon's wrist arguably constituted false imprisonment, one of the charges of which plaintiff was convicted. "[T]he essential element of false imprisonment is restraint of the person. Any exercise of express or implied force which compels another person to remain where he does not wish to remain, or to go where he does not wish to go, is false imprisonment." (*People v. Bamba* (1997) 58 Cal.App.4th 1113, 1123.) Plaintiff's change of clothing supported a consciousness of guilt inference, as did plaintiff's question to Fennell whether the children said he grabbed them and his proclamation that he "had no sexual gratisfication [*sic*], so it didn't happen." These facts warrant a conclusion that plaintiff's conduct and statements contributed to his arrest and conviction on the charges of kidnapping and falsely imprisoning Brandon. In opposition to this conclusion, plaintiff simply denied he had ever touched Brandon. The Board was amply justified in concluding plaintiff failed to meet his burden of proving that he did not contribute to his arrest or conviction.

Plaintiff argues that the appellate opinion granting his habeas corpus petition conclusively established his "innocence" and he "could not have contributed to his arrest or conviction in that his arrest was based entirely on the perjurious testimony of Breanna, Tiffany, and Samantha." Plaintiff fails to understand the nature of the appellate ruling granting his habeas corpus petition. "[A] habeas corpus proceeding is not a trial of guilt or innocence and the findings of the habeas corpus court do not constitute an acquittal. The scope of a writ of habeas corpus is broad, but in this case, as in most cases, it is

designed to correct an erroneous conviction. It achieves that purpose by invalidating the conviction and restoring the defendant to the position she or he would be in if there had been no trial and conviction. [Citations.] [¶] Thus, the conviction is set aside but the prosecution is not ended." (*In re Cruz* (2003) 104 Cal.App.4th 1339, 1346.) The Court of Appeal granted plaintiff's habeas petition because it lacked confidence in the integrity of the convictions, given the recantations by Breanna and Samantha. The court did not acquit plaintiff, much less determine that he was "innocent." It remanded the proceedings for a new trial on the charges pertaining to Brandon. That is all. And the court certainly did not address the issue of whether plaintiff contributed to his arrest and conviction.

Plaintiff also argues that "[t]he alleged acts were in reality a physical impossibility in that [he] walked with a limp and wore orthopedic shoes." Plaintiff admitted that, despite his limp and orthopedic shoes, he rode his bicycle into the parking lot and initiating a conversation with the children. His limp and orthopedic shoes obviously did not prevent him from doing the acts and making the statements that contributed to his arrest.

Plaintiff also argues that the Board "grossly misstated the charges" against him because the written decision states he was convicted of attempted kidnapping for the purpose of lewd and lascivious acts. Plaintiff is correct in this regard, but it is of no consequence to his failure of proof in the administrative proceedings. The Board's determination in no way depended upon whether or not the attempted kidnapping was for the purpose of committing lewd and lascivious acts.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.